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No. 73-1894

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In the Supreme Court of the United States

OCTOBER TERM, 1973

SIDNEY FLAXMAN,

Petitioner,

VS.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1973

NO.

SIDNEY FLAXMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Sidney Flaxman, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on April 23, 1974.

Opinion Below

The opinion of the Court of Appeals is presently unreported. It is reprinted as Appendix A, infra.

Jurisdiction

The judgment of the Court of Appeals (Appendix B, infra) was entered on April 23, 1974. A timely Petition for Rehearing and Suggestion of Appropriateness of a Rehearing En Banc was filed, and was denied on May 21, 1974. (Appendix C, infra) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Is a scheme to defraud the State of Illinois by submission of understated sales tax returns within the ambit of the federal mail fraud statute, where the mailings were incidental and collateral to the alleged scheme to defraud; and is a scheme to defraud the State of Illinois through submission of understated sales tax returns within the ambit of the federal mail fraud statute, where the State of Illinois has enacted its own statutory penalty for such conduct, and where the evidence showed that as to the taxpayers involved, it was the practice of the State of Illinois to knowingly accept sales tax returns which understated retail sales?

STATEMENT OF THE CASE

Petitioner, Sidney Flaxman, and four former officials of the Steinberg-Baum Company were named in an eight count indictment charging conspiracy and mail fraud in violation of Sections 371 and 1341 of Title 18, U.S.C. As it related to petitioner, the indictment alleged a scheme to defraud the State of Illinois by the filing of Retailers' Occupation Tax returns which understated the revenues of 13 retail stores operated by the Steinberg-Baum Company during the period January 1, 1968, through January 30, 1971.

After a bench trial petitioner was found guilty on all eight counts of the indictment and sentenced to concurrent two year prison terms on the first four counts, and concurrent two year terms of probation of the last four counts, the probation to be served consecutive to the prison terms.

Petitioner was an independent public accountant retained by Steinberg-Baum to prepare the Retailers' Occupation Tax Returns from data supplied him by the company. Each of the 13 retail stores operated by Steinberg-Baum was itself a separate corporation and filed a separate Retailers' Occupation Tax Return with the State of Illinois. Each month an employee of Steinberg-Baum would obtain totals of the cash and charge sales of each store, and would transmit the information to another employee who would enter the figures onto a general journal. When these figures were prepared, petitioner would come to the Steinberg-Baum office and prepare the Retailers' Occupation Tax Returns from these figures. Flaxman would give the completed returns back to a Steinberg-Baum employee who made out checks for payment of the tax and then took the completed returns and the checks to one Leonard Freedman,

the general manager of Steinberg-Baum and a co-defendant, for signature. The returns and checks were then placed in pre-printed envelopes furnished by the State of Illinois and placed in a box kept in the office for outgoing mail.

The sales tax returns so filed for the 13 stores during the period January 1, 1968, through March 31, 1971, were shown to have understated the true sales of the stores by approximately $30 million.

Flaxman testified that when he first prepared sales tax returns for Steinberg-Baum, he submitted the completed returns for approval to Louis Steinberg, a co-defendant. Steinberg told him that he had a large amount of exempt wholesale sales which he could prove and which should be deducted from the total on the returns. Steinberg gave Flaxman a figure for wholesale sales, and Flaxman then prepared the returns showing the wholesale sales as a deduction from the gross sales figure. Flaxman then showed this return to Steinberg for approval, but Steinberg told him that he did not want the return to reflect the wholesale figure, and directed him to show only the net retail sales figure on the return.

Flaxman followed this procedure of reporting only the net retail sales figure on the return without disclosing that a deduction for wholesale sales was being claimed each month during the period charged in the indictment. Flaxman said that in each instance Steinberg gave him the figure for wholesale sales which he was to deduct from the gross sales figure. The net figure which he reported on the return frequently amounted to ten percent of the total actual sales of the stores.

Leonard Freedman, the former general manager of Steinberg-Baum, testified for the government that he had never seen a report of wholesale sales from the stores. He further testified that it was a "rule of thumb" within the Steinberg-Baum Company to report only ten percent of sales on the Retailers' Occupation Tax Returns. Freedman said that these returns were then negotiated with the State of Illinois, and that as a result of these ongoing negotiations the percentage of sales declared on the returns was subsequently raised to up to fifty percent of the retail sales.

REASONS FOR GRANTING THE WRIT

Petitioner Sidney Flaxman stands convicted of conspiracy and mail fraud, upon an indictment charging a scheme to defraud the State of Illinois through submission of understated retail sales tax returns. The government's unprecedented use of the mail fraud statute to reach this local tax matter, peculiarly within the province of the State of Illinois, raises fundamental questions as to the scope of federal criminal jurisdiction which merit review by this Court.

Petitioner, a certified public accountant, prepared understated Illinois Retailers' Occupation Tax Returns for various retail outlets of the Steinberg-Baum Company. Once completed, the returns were submitted to the State of Illinois by mail. A government witness, a former Steinberg-Baum officer, testified that it was company policy to report only 10% of retail sales on the returns, and to then negotiate the returns with the State of Illinois over the additional amount to be remitted by Steinberg-Baum. He said that these on-going negotiations eventually resulted in Steinberg-Baum reporting up to 50% of retail sales on the returns.

The government maintained this prosecution under the mail fraud statute, 18 U.S.C. §1341, which provides in relevant part:

> "Whoever, having devised * * * any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses * * * for the purpose of executing such scheme or artifice or attempting to do so * * * knowingly causes to be delivered by mail * * * any matter or thing * * *".

This statute has, with various modifications, been in force for more than a century. Throughout its history, it has been emphasized that the statute does not reach all frauds involving the use of the mails, but only those where the abuse of a federal instrumentality, the Post Office, is an integral part of the execution of the fraud. *Kann* v. *United States,* 323 U.S. 88, 95 (1944); *Parr* v. *United States,* 363 U.S. 370, 380 (1960); *United States* v. *Kelem,* 416 F.2d 346, 347 (9th Cir. 1969), cert. denied, 397 U.S. 952 (1969); *United States* v. *Maze,* 468 F.2d 529, 536 (6th Cir. 1972), affirmed, 94 S.Ct. 645 (1974). The statute was never intended either to infringe upon state law enforcement, or to be a part of a scheme of federal-state cooperation. See, *United States* v. *Sheridan,* 329 U.S. 379, 387 (1946).

In *Kann* v. *United States,* supra, the Supreme Court said, with regard to jurisdiction under the mail fraud statute,

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." 323 U.S. at 95.

The principal that local frauds should be prosecuted by local authorities rather than under the federal mail fraud statute is similarly expressed in *United States* v. *Kelem,* 416 F.2d 346 (9th Cir. 1969) and *United States* v. *Chason,* 451 F.2d 301, 304 (2d Cir. 1971).

In *Kelem,* 416 F.2d 346 (1969) the court said:

> It is elementary that the jurisdiction of federal courts is defined and limited by the Constitution and congressional action; hence, statutes such as section 1341 should be carefully and strictly construed in order to avoid extension beyond the limits intended by

> Congress. Healy v. Ratta, 292 U.S. 263, 270, 54 S.Ct. 700, 78 L.Ed. 1248 (1933); Kline v. Burke Constr. Co., 260 U.S. 226, 233-234, 43 S.Ct. 79, 67 L.Ed. 226 (1922). Moreover, such construction is especially appropriate where, as here, the Government urges that we construe a federal criminal statute so that it reaches conduct which the states should appropriately control and which they can control, effectively. Indeed as the Supreme Court has emphasized, section 1341 is not designed to reach all frauds "but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."

If application of the mail fraud statute is indeed limited to those situations involving a distinctly federal interest, the statute does not reach the situation here, where the alleged criminal conduct is directed against a sovereign state, and where use of the mails is wholly tangential to execution of the scheme. The retail sales tax returns in question were prepared by Petitioner at the offices of Steinberg-Baum. The returns were executed there by an official of the company, and checks were drafted in the amount shown to be due on the returns. Only then, after the alleged scheme had reached fruition, was the mail employed to submit the returns to the State of Illinois.

The Supreme Court has recently taken the opportunity to underscore its disapproval of convictions based upon mailings which were not for the purpose of executing a scheme to defraud. In *United States* v. *Maze,* 94 S.Ct. 645 (1974), the Court affirmed the reversal of a mail fraud conviction where the defendant had utilized a stolen credit card to obtain food and lodging, and those establishments transmitted invoices by mail to the issuing bank for those services. In holding that the mailings were not "sufficient-

ly closely related" to the scheme, Mr. Justice Rehnquist noted for the majority that, "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact sued as a result of the scheme. But it did not do this; instead, it required that the use of the mails be for the purpose of executing the scheme." *Id.* at 651. See also, *United States* v. *Miles*, ... U.S. ..... (March, 1974).

As in *Maze*, supra, the use of the mails here was utterly tangential to the execution of the scheme. For any purpose connected with the scheme, personal delivery to the State of Illinois would have sufficed. The mails were not used here to accomplish the scheme, nor to "lull" the State of Illinois into not suspecting that it had been defrauded, nor to conceal the fraud. The mails came into use only after the understated returns had been completed and executed, and the scheme thus already accomplished. Whether the mail fraud statute may reach such a situation is the first issue of significance raised by Petitioner's conviction.

The second issue, related yet distinct, is whether a scheme to defraud a state by filing understated state sales tax returns is within the ambit of federal criminal jurisdiction generally, and the mail fraud statute in particular. The State of Illinois, in the exercise of its sovereign powers, has enacted a system of taxation upon retail sales of tangible personal property. See, Chapter 120, Illinois Revised Statutes, Chapter 440, et. seq. Illinois has also provided for a system of collecting that tax, and of punishing those who file understated retail sales tax returns. Chapter 120, Illinois Revised Statutes, Section 452, as in effect during the period charged in the indictment, provided in relevant part:

> "Any person engaged in the business of selling tangible personal property at retail in this state * * * who files a fraudulent return * * * is guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than $25.00, nor more than $5000, or be imprisoned in a penal institution other than a penitentiary for not less than 1 month, nor more than six months, or be both so fined and imprisoned * * *."

The record makes clear that, in the further exercise of its sovereign powers, the State of Illinois was willing to accept from Steinberg-Baum sales tax returns which reflected less than 100% of actual retail sales. A former Steinberg-Baum official, testifying as a government witness, stated that it was a "rule of thumb" within the company to file returns reflecting only 10% of actual retail sales, and to then negotiate additional amounts due with the State of Illinois.

He further testified that as a result of these on-going negotiations, the percentage of retail sales reported on the returns by Steinberg-Baum eventually rose to 50%.

If the State of Illinois was willing to accept either the 10% or 50% figure on the returns, it did not consider itself to have been defrauded. In very real effect, the Federal government has prosecuted petitioner because it disagrees with the manner in which the State of Illinois administers its own revenue laws. If the State of Illinois considered the filing of an understated sales tax return to be only a misdemeanor, and then, in the further exercise of its sovereign powers over the administration of its own tax laws, determined that it would accept understated returns, certainly the state was acting within its own prerogatives.

Admittedly, the literal language of the mail fraud statute would encompass this situation. That does not end the inquiry, however. In *Sorrells* v. *United States,* 287 U.S. 435 (1932), the Supreme Court held that, although a defendant had engaged in conduct proscribed by a federal statute, it would refuse to apply a statute where the result would be unreasonable or unjust. Quoting from *United States* v. *Kirby,* 7 Wall, 482, 19 L.Ed. 278, the Court said,

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

These principles take on special importance where, as here, we deal with the delicate balance between federal and state jurisdiction. See, *Palmer* v. *Massachusetts,* 308 U.S. 79, 83-4 (1935). Recently, this Court twice struck down literal interpretations of federal criminal statutes on grounds that literal interpretations would encroach upon the prerogatives of the states. In *Rewis* v. *United States,* 401 U.S. 808 (1971), the Court considered the limits of the "Travel Act", 18 U.S.C. §1952, which forbids the use of facilities of interstate commerce in aid of an unlawful activity. In reversing the convictions of two operators of a Florida lottery located just across the Georgia border, the Court said,

> "Given the ease with which citizens of our Nation are able to travel and the existence of many multistate metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation, are patronized by out-of-state customers. In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police

> resources, and might well produce situations in which the geographic origin of customers, a manner of happenstance, would transform relatively minor state offenses into federal felonies."

In *United States* v. *Bass*, 404 U.S. 336 (1971), the Supreme Court affirmed the reversal of a conviction under Section 1202(a)(1) of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §1202(a). The Court read that section to require a nexus between possession of a weapon and interstate commerce, and rejected the government's contention that the statute did not require such a showing. The Court said,

> "Because its sanctions are criminal and because, under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress." *Id.* at 339.

The Court then relied in part on its earlier decision in *Rewis* v. *United States*, supra, and emphasized that it would not lightly assume that Congress intended a statute to alter delicate federal-state relationships.

The rationale of this Court in *Rewis* and *Bass* applies with even greater force to the case at bar. Here the federal government, through the mail fraud statute, is attempting to administer the revenue collection procedures of the State of Illinois. The record establishes that the State of Illinois knowingly accepted understated sales tax returns from Steinberg-Baum. Yet the federal government is in effect telling the State of Illinois that it can no longer follow such a procedure. Collection of its own revenues is a matter wholly within the sovereign province of the State of Illinois. Use of the mail fraud statute here is unwarranted, and clearly does great violence to established federal-state relationships.

One additional aspect of the government's use of the mail fraud statute to reach local revenue collection procedures requires mention. The Chief Justice of the United States had repeatedly warned that the continued expansion of federal jurisdiction poses a very real danger to an already overburdened federal judiciary. See Burger, The Courts on Trial, 22 F.R.D. 71; Burger, The State of the Judiciary—1970, 56 A.B.A. Journal, 929 (October, 1970). The case at bar may well be only the harbinger of a myriad of federal attempts to police local revenue collection through the mail fraud statute. Already, in a case presently pending on appeal, the government utilized the mail fraud statute to reach a scheme to defraud the State of Missouri through the filing of understated sales tax returns. *United States* v. *Mirabile* (8th Cir., No. 1367). So drastic an expansion of federal criminal jurisdiction into areas traditionally, and best, left to the states, ought not be permitted without review by this Court.

Conclusion

For the above and foregoing reasons, we respectfully submit that a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

September Term, 1973 September Session, 1973

No. 73-1616

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SIDNEY FLAXMAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 72 CR 102
Philip W. Tone, *Judge.*

Argued October 31, 1973—Decided April 23, 1974

Before KILEY, *Senior Circuit Judge,* PELL, and SPRECHER, *Circuit Judges.*

PELL, *Circuit Judge.* Appellant Sidney Flaxman and four former officials of the Steinberg-Baum Company discount stores were named in an eight-count indictment charging conspiracy and mail fraud, 18 U.S.C. §§371, 1341. The indictment alleged, *inter alia,* that false retailers' occupation tax returns had been submitted to the State

of Illinois. From January 1, 1968, through January 30, 1971, the returns submitted had understated sales by approximately $32 million, resulting in a loss of revenue to the State of Illinois of roughly $1.5 million.

Only Flaxman, a CPA hired to prepare the Company's occupation tax returns and federal income tax returns, stood trial.[1] After a bench trial, the court found Flaxman guilty as charged. The court sentenced the defendant to concurrent two-year prison terms on the first four counts and to probation for two years on the last four counts, the term of probation to be served consecutively to the imprisonment.

On this appeal, Flaxman raises four issues: (1) whether the evidence was sufficient to sustain the court's finding on Count I, the conspiracy count; (2) whether mailings of the Illinois tax returns were an integral part of the defendant's scheme; (3) whether the Government presented sufficient evidence of the use of the United States mails; and (4) whether the evidence proved that Flaxman had had the intent to defraud.

I

Since the same evidence reflects on both the first and fourth contentions, we will consider them together. Flaxman first started to prepare the state tax returns in 1962 or 1963. One of the office workers would give the defendant the total sales figures for each of the Steinberg-Baum stores. There were thirteen retail stores, each of which was a separate corporation. According to Flaxman, when he first prepared a retailers' occupation tax return and

[1] Three of the other defendants pleaded guilty. The fourth became a fugitive.

showed it to Louis Steinberg, president of the companies and named in the indictment as a co-conspirator, Steinberg told him that he had not taken into account the wholesale sales. From a notebook, Steinberg gave Flaxman the amounts of wholesale sales which he, Steinberg, said should have been deducted.[2]

Flaxman then made the return showing the gross receipts and the net figures after deducting the supposed wholesale sales amounts. After he showed this to the president, Steinberg insisted that he wanted only the net taxable figure stated on the return. Flaxman accordingly prepared the return and all subsequent returns in this fashion, although the tax form clearly called for "Total Receipts from sales of Tangible Personal Property and Services," followed by "Total Deductions Authorized by Law," the first category of which was "Receipts From—Sales Made for Purpose of Resale," *i.e.*, wholesale sales.

Flaxman was not an employee of the company but was an independent professional man, a certified public accountant, who by the manner of filling out the returns, which he did personally, was participating in a representation to the state taxing authority that the amounts reported were the total or gross sales including wholesale sales, whereas in fact the figure reported would have been a net figure after deducting the purported wholesale sales. The wholesale sales amounts furnished by Steinberg were fictitious and generally amounted to 90% of the total sales.

Flaxman testified that he relied upon Steinberg's assertion that he could prove the wholesale figures, that it was not his responsibility to look behind the figures

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[2] The occupation tax is measured by the gross receipts from sales of tangible personal property at retail. It is designed to cover retail sales only. *Theo. B. Robertson Products Co.* v. *Nudelman,* 389 Ill. 281, 59 N.E.2d 655 (1945).

furnished by the taxpayer, and that he had been told that the net figure could be used for the total sales amount when he had been an employee of the Illinois Department of Revenue.

The district court obviously did not find Flaxman a credible witness, and we, of course, are not to second guess the trier-of-fact's determinations of credibility. Aside from disbelief of some of this testimony on a credibility basis, we note that while Flaxman relied on a bulletin from the American Institute of Certified Public Accountants on the scope of the accountant's responsibility, that bulletin also stated that the "CPA cannot ignore the implication of information known by him . . . ."

There is more than sufficient evidence here to support a reasonable inference that Flaxman was engaged in a covert procedure with regard to reporting the sales income of the involved companies. He ignored the plain language of the return form, which called for total sales income and authorized deductions to be listed separately.[3] The return had a place for the signature of the person, other than the taxpayer, preparing the return. Flaxman

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[3] The Illinois statute, Chapter 120, § 442, in pertinent part provided: ". . . on or before the last day of each calendar month, every person [including corporations] engaged in the business of selling tangible personal property at retail in this State during the preceding calendar month, shall file a return with the Department, stating:

* * *

3. Total amount of receipts received by him during the preceding calendar month from sales of tangible personal property . . .

* * *

5. Deductions allowed by law. . . ."

"The statute sets forth with great detail the matters which must go into the monthly return, and lays down a guide which, when followed, leaves nothing open for arbitrary discretion." *Department of Finance* v. *Cohen*, 369 Ill. 510, 516, 7 N.E.2d 327 (1938.

never put his signature on the returns even though he prepared the returns, typing the final return himself. He gave as his reason for not signing that he had not made any examination of the wholesale sales. However, the form did not call for signature by an auditor of the books but by the preparer of the return.

Although Flaxman ignored the itemization for deductions authorized by law, he did apparently compute what the occupation tax would be for the total receipts item, which was to include tax collected by the stores, and he would then deduct this amount to determine the tax to be paid. This amount could have had virtually no relationship to the amount of tax actually collected from customers because the reported figure of total receipts, which included tax collected, was only, as indicated hereinbefore, about 10% of the actual total. He had been at the two stores the returns for which were the subject of the various counts of the indictment, had seen their advertisements in the newspapers, and admitted on the stand that they were what one would call retail stores. Yet, he expressed no scepticism that 90% of their receipts were of wholesale character.

As the district court said in sentencing the defendant, "He cannot hide behind the shield of the accounting manual practice and procedures . . . [H]e cannot shut his eyes to what he must understand is erroneous information . . . . He had to know what was wrong." There was sufficient evidence of intent to defraud.

As to Count I, Flaxman argues that the Government failed to prove beyond a reasonable doubt that he had entered into an agreement with anyone to commit the offense charged in the conspiracy count. However, "[i]t is well settled in our Circuit that no formal agreement

is necessary to constitute a conspiracy to commit an offense under 18 U.S.C. § 371 . . . ." *United States* v. *Robinson,* 470 F.2d 121, 123 (7th Cir. 1972). The Government may rely upon circumstantial evidence of a concert of action among the defendants. Further, a conspirator need not participate in all the activities of a conspiracy in order to be held liable for the unlawful scheme. *United States* v. *Cardi,* 478 F.2d 1362, 1368-69 (7th Cir. 1973); *United States* v. *Fellabaum,* 408 F.2d 220, 224 (7th Cir. 1969), *cert. denied,* 396 U.S. 858.

The evidence which we have reviewed in our opinion clearly is sufficient to establish by circumstantial evidence that Flaxman, although he originally had attempted to set up the figures on the return in a manner of proper disclosure, did ultimately agree to the covert procedure and this agreement continued through subsequent years during which Flaxman utilized the supposed relatively minimal retail sales figures as furnished by Steinberg.

The fair inference from Flaxman's testimony, and for the present purposes we have accepted his version on this phase of the case, is that he secured the supposed wholesale sales figures each time from Steinberg, thus assuming Steinberg's availability month after month over several years time. In this connection, it is to be noted that the employee, Williams, who turned the actual total receipts figure over to Flaxman, testified that it wasn't usual for Flaxman to go in to talk to the "bosses." If this were true, the participation in the scheme by Flaxman was even more patent. There was evidence from General Manager Freedman that Steinberg-Baum's policy was to report only about 10% of actual retail sales. If Flaxman did not get the monthly figure from Steinberg, the inference is strong that he was automatically implementing the 10% agreed upon policy.

Under either approach, the circumstantial evidence is sufficient to support the conspiracy conviction.

II

Defendant next asserts that "the mailings of the sales tax returns here occurred after the scheme had been essentially accomplished . . . ."

A Steinberg-Baum employee testified that the Illinois Department of Revenue supplied preprinted envelopes for the occupation tax returns and that it was her practice to put the completed returns in the envelope provided by the State and then to place the envelope in the office's outgoing mail container. Prominently placed on the front of the forms issued by the State was the instruction: "—Mail to—Retailers' Occupation Tax Division, 400 South Spring Street, Springfield, Illinois 62706." Thus, the misrepresentations that constituted the fraud were contained in documents that were to be sent through the mails.

However, even assuming that the returns could have been delivered to Springfield by private messenger, an essential part of the scheme to defraud was the delivery, and here it was by United States mail, bringing the activity in question within federal criminal jurisdiction.

Subsequent to oral argument in this case, the United States Supreme Court handed down its decision in *United States* v. *Maze,* ..... U.S. ..... (42 U.S.L.W. 4113, January 8, 1974). The defendant in his brief, however, relied on earlier cases to the same effect as *Maze,* such as *Kann* v. *United States,* 383 U.S. 88 (1944). Nothing in this line of cases, including *Maze,* in our opinion is of help to Flaxman. In *Maze,* the scheme had reached fruition when the credit card was used. Subsequent mailing did not forward

the scheme so far as the perpetrator was concerned. His scheme had been accomplished. Here, however, the delivery to the revenue office was an integral part of the scheme.

It would appear that a person who desires to evade taxes could take one of two principal routes. He could just decline to file a return or he could file a return with false figures. The first path, of course, would not require any delivery, but it leaves the perpetrator in the position of being on the face of the matter a law violator. The second route places him in the facial position of having complied with the law, and in the absence of an audit, or the matter being brought to the attention of the taxing authorities by an informer, he is home free. Thus, under the semblance of compliance course, the most significant act to accomplish the scheme was the delivery to Springfield. Fruition was brought about directly by the use of the mails.

Just because the State of Illinois was the victim and makes such a scheme illegal does not preclude the Federal Government from prosecuting the perpetrators under an applicable federal law. *Parr* v. *United States,* 363 U.S. 370 (1960).

III

Some of the same factors bear on the related issue of whether the Government met its burden on the use of the mails. In addition to the testimony about the procedures used in the Company's office, there was evidence that the returns were in fact received by the Illinois Department of Revenue. The checks accompanying the returns, some of which were introduced into evidence, had been negotiated and obviously also had reached the Department of

Revenue. Further, witness Jankovich stated that she sent deposits to banks in the same manner and that she received deposit slips acknowledging receipt of the deposits. Evidence of office custom and procedure is acceptable to establish the fact of mailing where the witness did not personally place the letter in a U.S. mailbox. *United States* v. *Fassoulis,* 445 F.2d 13, 16-17 (2d Cir. 1971), *cert. denied,* 404 U.S. 858. Viewing the evidence, as we must, in the light most favorable to the Government, we find that the trier-of-fact's determination must be upheld.

For the reason hereinbefore set out, the judgment of conviction is affirmed.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

April 23, 1974

Before
Hon. Roger J. Kiley, Senior Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 73-1616 vs.

SIDNEY FLAXMAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of conviction of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
May 21, 1974.

Before
Hon. Roger J. Kiley, Senior Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 73-1616 vs.

SIDNEY FLAXMAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 72 CR 102
Philip W. Tone, *Judge*

On consideration of the petition of defendant-appellant, Sidney Flaxman, for a rehearing by the court *en banc* in the above-entitled appeal, and, no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the defendant-appellant for a rehearing *en banc* in the above-entitled appeal be, and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1894

SIDNEY FLAXMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his use of the mails was not an integral part of his scheme to defraud the State of Illinois and that federal prosecution was an unwarranted invasion of the State's authority to administer its own revenue collection procedures.

After a bench trial, petitioner was convicted on eight counts charging use of the mails to execute a scheme to defraud (18 U.S.C. 1341) and conspiracy to commit that offense (18 U.S.C. 371).[1] He was sentenced to concurrent terms of two years' imprisonment on each of the first four counts and to concurrent terms of two years' probation on each of the last four counts, the probation terms to run consecutive to the prison terms. The court of appeals affirmed in a thorough opinion, upon which we rely (Pet. App. 1-9; 495 F. 2d 344).

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[1]Three co-defendants pleaded guilty. A fourth became a fugitive.

The evidence, which is accurately summarized in the opinion of the court of appeals, showed that petitioner, a certified public accountant, was hired to prepare the Illinois Retailers' Occupation Tax returns for the Steinberg-Baum Company. Between January 1, 1968, and January 30, 1971, petitioner knowingly prepared and caused to be mailed to the Illinois Department of Revenue monthly returns that understated the company's sales by a total of approximately $32 million. The returns called for the retailer's gross sales receipts, deductions (including any wholesale sales), and net taxable sales. The evidence showed that petitioner reported only the net figure, which he represented as the gross receipts figure. Moreover, he derived the net figure by deducting from the actual gross receipts fictitious wholesale sales figures furnished to him by the company's president. The court of appeals agreed with the district court's finding that petitioner must have known that the fictitious wholesale sales figures, amounting to 90 percent of the gross receipts, were erroneous. "* * * 'He had to know what was wrong.' There was sufficient evidence of intent to defraud" (Pet. App. 5).

1. Petitioner contends that there was insufficient evidence to convict him under the mail fraud statute, 18 U.S.C. 1341, because the mails were "not used here to accomplish the scheme" (Pet. 9). He argues that the scheme had "reached fruition" when the false returns had been executed by the company official and checks had been drafted for the amount due as shown on the returns (Pet. 8), and that the subsequent use of the mails was "utterly tangential to the execution of the scheme" (Pet. 9).

As the court of appeals correctly stated, however, "even assuming that the returns could have been delivered to Springfield by private messenger, an essential part of the scheme to defraud was the delivery, and here it was by United States mail, bringing the activity in question within federal criminal jurisdiction" (Pet. App. 7).

This case is thus unlike *United States* v. *Maze*, 414 U.S. 395, where this Court held that the success of a fraudulent credit card scheme did not depend upon the mailing of invoices by the defrauded merchants. Those mailings, the Court held, were directed only "to the end of adjusting accounts" among the victims of the scheme and were not an essential aspect of the scheme itself (414 US. at 402). Here, by contrast, "the delivery to the revenue office was an integral part of the scheme" (Pet. App. 8). Indeed, "the most significant act to accomplish the scheme was the delivery to Springfield. Fruition was brought about directly by the use of the mails" (*ibid.*).

2. Petitioner further contends (Pet. 9-13) that his criminal acts were not subject to federal prosecution because the State of Illinois, the victim of the scheme, has its own laws for punishing tax violators. It is settled, however, that an offender whose behavior constitutes both a federal and a state crime may be prosecuted by either or both jurisdictions. *Bartkus* v. *Illinois*, 359 U.S. 121; *Abbate* v. *United States*, 359 U.S. 187. "The fact that a scheme may violate state laws does not exclude it from the proscriptions of the federal mail fraud statute, for Congress 'may forbid any * * * [mailings] * * * in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not' " (*Parr* v. *United States*, 363 U.S. 370, 389). Consequently, as the court of appeals stated, "[j]ust because the State of Illinois was the victim and makes such a scheme illegal does not preclude the Federal

Government from prosecuting the perpetrators under an applicable federal law" (Pet. App. 8).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

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[2]Although petitioner claims that Illinois "did not consider itself to have been defrauded" (Pet. 10), there is nothing in the record to support that assertion. One witness testified that, "after a previous period of years had been settled with the State of Illinois and there were ongoing negotiations for a new period," the company began to report 50 percent of its sales instead of 10 percent (Tr. 208). But even if the State had agreed to a settlement in lieu of prosecution, that does not mean that it acquiesced in the company's illegal conduct; nor does it mean that the scheme was not one to defraud the State of tax revenues owed to it.

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

SIDNEY FLAXMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

REPLY TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1894

SIDNEY FLAXMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

REPLY TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

In response to Petitioner's argument that a scheme to defraud the State of Illinois through the filing of understated State sales tax returns is not within the ambit of federal criminal jurisdiction generally, and the federal mail fraud statute in particular, the Government cites *Bartkus* v. *Illinois*, 359 U.S. 121, and *Abbate* v. *United States*, 359 U.S. 187. (Memorandum of the United States in Opposition, P. 3) We reply to the Government's memorandum because neither *Bartkus* v. *Illinois*, supra, nor *Abbate* v.

United States, supra, is in point, and because the Government has ignored the substance of Petitioner's contention that utilization of the mail fraud statute to reach the conduct of Petitioner represents a drastic expansion of federal criminal jurisdiction into areas best left to the sovereign states.

Bartkus v. *Illinois,* supra, and *Abbate* v. *United States,* supra, hold that successive state and federal prosecutions for conduct at once violative of both federal and state laws is not barred by the Fifth Amendment to the Constitution of the United States. Here there has been no prior state prosecution. Further, in neither *Bartkus* nor *Abbate* was an issue raised as to the federal government's interest in the prosecution. In *Abbate* v. *United States,* supra, the defendant was charged with conspiring to destroy telephone transmission lines, which were "essential and integral parts of systems and means of communication operated and controlled by the United States." In *Bartkus* v. *Illinois,* supra, the charge was robbery of a federally insured savings and loan association. Here, the question is whether the federal government may reach Petitioner's conduct, where the alleged scheme is one to defraud the State of Illinois; where the State of Illinois had enacted a statutory scheme for enforcement of its own revenue laws; and where the only "damage" to a federal interest is a fictional "contamination" of the United States mail through transmission of allegedly fraudulent documents

Citation to *Bartkus* and *Abbate* as authority for the proposition that the federal government could maintain this prosecution is thus inappropriate. The issue raised for the Court's consideration is whether, where the nexus between the alleged crime and a federal interest is so

attenuated as to be a fiction and the alleged crime is one traditionally within the domain of a sovereign state, the federal government may prosecute at all.

For the reasons stated in our Petition, we respectfully urge the Court to consider this issue.

Respectfully submitted,

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